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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 236

STERN & STERN TEXTILES, INC. (Successor in Interest to Huguet Fabrics Corporation), *Petitioner*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Comes now the petitioner, through its counsel, Howe P. Cochran, and answers respondent's brief in opposition to the granting of a writ of certiorari in the above-entitled case.

The brief of respondent is, for the most part, a general denial of the petitioner's case, but two or three things of importance stand out.

1. On page 7, under "2", respondent says that petitioner's claim that "there should have been a review by the Special Division of the Tax Court, in keeping with Section 732 (d) of the 1939 Code is without merit."

Respondent is entirely in error.

Section 732 (d) absolutely requires a review by "a special division of the Tax Court which shall be constituted by the presiding judge and consist of not less than three judges of the Tax Court" of the "determinations and redeterminations by any division of the Tax Court *involving any question* arising under * * * Section 722 with respect to any taxable year" (italics added). Indeed, until a review has been had, the determination by any division of the Tax Court shall not be deemed to be a decision of the Tax Court, for the Code continues: "The decisions of such special division shall not be reviewable by the Tax Court, and shall be deemed decisions of the Tax Court." It is respectfully submitted that if a review was demanded by the Code, and if the decision of the reviewing body "shall be deemed" the decision of the Tax Court, then the decision by one judge of the Tax Court who refused to submit the matter to the reviewing body could not possibly have been a decision of the Tax Court.

Respondent suggests that Section 732 (c) "would bar a review of a denial on the merits of relief under Section 722."

Again he is in error.

He puts himself on the horns of a dilemma.

On the one horn, if the Tax Court, without the necessary review, attempted to "decide" this case on the grounds of collateral estoppel, an appeal to the Second Circuit would lie, first because there was no review by the Special Division of the Tax Court as required by law so as to make the "decision" a decision of the Tax Court; and second, because a plea of collateral estoppel arising in a Section 722 case, while it is a question arising under Section 722, does not involve "the determination of any question [made] necessary *solely* by reason of * * * Section 722," which is the express limitation contained in Section 732 (c) (italics added).

On the other horn, if the Tax Court, without the necessary review, attempted to decide this case on the merits, an appeal to the Second Circuit would lie because, first, there was no review by the Special Division of the Tax Court as required by law so as to make the "decision" a decision of the Tax Court such as would invoke Section 732 (c); and, second, because no administrative body acting as though it were a court, and, indeed, no court could decide a case on its merits without first allowing the case to be heard on its merits.

Respondent admits that a review by the Special Division of the Tax Court was required by the Code; and respondent admits that a review was not had, but respondent brushes aside as "without merit" the complaint that the requirements of the Code were not met.

2. Respondent's argument that the matter of the failure to afford a review by the Special Division of the Tax Court was not raised in the Second Circuit until after the decision in the Second Circuit, is not true.

This point was, in fact, raised by the petitioner in its Petition for Review to the Court of Appeals, and respondent must know that fact. On its Petition for Review to the Second Circuit in the present case, under the heading, "Nature of Controversy," the following appears:

> "Can one Judge of The Tax Court, acting alone, decide a question arising on a Section 722 relief case?" (Unprinted Record on Appeal, p. 728.)

Under "Assignments of Errors," the following appears:

> "The Tax Court erred in permitting one Judge to decide a case when the statute prescribes, in cases such as these, that a Division of The Tax Court, consisting of not fewer than three Judges shall decide such cases." (Unprinted Record on Appeal, p. 729.)

3 Respondent agrees with the petitioner that the holding made by the Second Circuit in its opinion that the petitioner had not shown that it suffered a "temporary" depression in the base period was not pertinent to the case. Here is what the respondent said in the footnote on page 9:

> "10. [That] reference (Pet. 8a) by the Court of Appeals * * * may have been unnecessary, since the taxpayer no longer relied (Pet. 32) on Section 722 (b) (2). * * * *"

Petitioner respectfully submits that the Second Circuit does not make unnecessary findings in citing the reasons why a petitioner must lose its case. The Second Circuit does not waste its time in deciding cases by reaching conclusions that are of no consequence.

It is clear that the Second Circuit was misled, and ruled against the petitioner through a misconception of the petitioner's cause of action.

Respectfully submitted,

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